

FILED

JAN 31 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAWilliam Odessa Brown II

NAME

K-93463

PRISON NUMBER

Calipatria State Prison PO Box 5004

CURRENT ADDRESS OR PLACE OF CONFINEMENT

Calipatria, CA 92233-5004

CITY, STATE, ZIP CODE

Petitioner, In Pro Per

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Northern

E-filing

CW

William Odessa Brown II

(FULL NAME OF PETITIONER)

PETITIONER

v.

L. E. Scribner(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

Edmund G. Brown Jr.The Attorney General of the State of
California, Additional Respondent.

CV

08

0750

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

(PR)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: _____

Superior Court, Santa Cruz, CA

2. Date of judgment of conviction:
- 20 April 1998

3. Trial court case number of the judgment of conviction being challenged: _____

57-09413

4. Length of sentence:
- 13 years

5. Sentence start date and projected release date: 20 April 1998, between Aug 2008 and June 2010.
6. Offense(s) for which you were convicted or pleaded guilty (all counts): 192(a) Voluntary Manslaughter, 245(a)(1) Assault with Fire and 667.5(b) PC.
7. What was your plea? (CHECK ONE)
- (a) Not guilty ☐
- (b) Guilty ☐
- (c) Nolo contendere ☒
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
- (a) Jury ☐
- (b) Judge only ☐
9. Did you testify at the trial?
- ☐ Yes ☐ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
- ☒ Yes ☐ No
11. If you appealed in the California Court of Appeal, answer the following:
- (a) Result: Reversed / Affirmed in full
- (b) Date of result (if known): 4-19-1999
- (c) Case number and citation (if known): HO18548
- (d) Names of Judges participating in case (if known): Justice Gottle, Christopher C. Author; Justice 245 Prema, Eugene M. + Elia, Franklin D. (Concurs)
- (e) Grounds raised on direct appeal: Cannot recall
12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following: N/A
- (a) Result: _____
- (b) Date of result (if known): _____
- (c) Case number and citation (if known): _____
- (d) Grounds raised: _____

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: N/A

(b) Date of result (if known): _____

(c) Case number and citation (if known): _____

(d) Grounds raised: _____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

☒ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

(a) California Superior Court Case Number (if known): 57-09413

(b) Nature of proceeding: _____

(c) Grounds raised: That the Petitioner was sentenced to the maximum or upper term without a trial by jury. (See Attached

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: _____

(f) Date of result (if known): 20 Jun 2007

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

☒ Yes ☐ No

17. If your answer to #16 was "Yes," give the following information:

- (a) California Court of Appeal Case Number (if known): H031715
- (b) Nature of proceeding: _____
- (c) Names of Judges participating in case (if known) Mihara Acting P.J.,
McAdams J. participated
- (d) Grounds raised: Same as #15
- _____
- (e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (f) Result: Denied
- (g) Date of result (if known): 9 Jul 2007

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

☒ Yes ☐ No

19. If your answer to #18 was "Yes," give the following information:

- (a) California Supreme Court Case Number (if known): S154458
- (b) Nature of proceeding: _____
- _____
- (c) Grounds raised: Same as #15
- _____
- _____
- _____
- (d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (e) Result: Denied
- (f) Date of result (if known): 3 Jan 2008

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:

N/A This does not apply its the same issues or grounds

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☒ Yes ☐ No (If "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? _____

(i) What was the prior case number? _____

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: _____

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUND FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** That the trial court sentenced the Defendant to the upper term without a trial. The DSL states that only the statutory-max can be given.

Supporting FACTS: Cunningham v. California, Apprendi v. New Jersey, and Blakely v. Washington.

Did you raise GROUND ONE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following: See Attached Exh. D 79123-125

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

(b) **GROUND TWO:**

Supporting FACTS:

Did you raise GROUND TWO in the California Supreme Court?

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

(c) **GROUND THREE:** _____

Supporting FACTS: _____

Did you raise GROUND THREE in the California Supreme Court?

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

(d) **GROUND FOUR:** _____

Supporting FACTS: _____

Did you raise GROUND FOUR in the California Supreme Court?

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?

☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: _____

(b) Case Number: _____

(c) Date action filed: _____

(d) Nature of proceeding: _____

(e) Name(s) of judges (if known): _____

(f) Grounds raised: _____

(g) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

☐ Yes ☐ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes ☐ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☒ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

23 Jan 2004

(DATE)

Wm [Signature]

SIGNATURE OF PETITIONER

1 William Brown K93463

2 PO Box 5004

3 Colipatria CA 92023

4 Koffman En Pro Per

5 United States District Court
6 Northern District Cal. San Jo
7
8
9

10 In re:

Case No.

11 WILLIAM ODESSA BROWN II,

12 Plaintiff,

PETITION FOR WRIT OF HABEAS
CORPUS.

13 ON HABEAS CORPUS.
14 _____/

15
16 INTRODUCTION

17 Petitioner was sentenced to multiple terms under the DSL. Court
18 Rules adopted to implement the DSL define circumstances in aggravation
19 as facts that justify the upper term. Based on the sentencing judges
20 findings petitioner was sentenced to an aggravated term, which is the
21 upper term according to the scope of the DSL sentencing guidelines.

22 The DSL, by placing sentence-elevating factfinding within the judge's
23 province, violates a defendant's right to trial by jury safeguarded by
24 the Sixth and Fourteenth Amendments.

25 ///

26 ///

27 ///

28 ///

1 The judge could not have imposed a sentence outside the standard range
2 without finding an additional fact, the mid-term should have been the
3 relevant statutory maximum.

4 IV.

5 In all material respects, California's DSL resembles the sentencing
6 systems invalidated in Blakely and Booker. Following the reasoning in
7 those cases, the middle term prescribed under California law, not the
8 upper term, is the relevant statutory maximum. Because aggravating facts
9 that authorize the upper term are found by the judge, and need only be
10 established by preponderance of evidence, the DSL violates the rule of
11 Apprendi. The DSL requires statutory sentence enhancements (as distinguished
12 from aggravators) to be charged in the indictment and proved to a jury
13 beyond a reasonable doubt.

14 V.

15 The DSL, however, does not resemble the advisory system the Court
16 in Booker had viewed. Under California's system, judges are not free to
17 exercise their discretion to select a specific sentence within a defined
18 range. Ibid. California's Legislature has adopted sentencing triads, three
19 fixed sentences with no range between them. Petitioner's sentencing judge
20 had no discretion to select a sentence within the lower or upper terms,
21 but had to impose the mid-term, nothing less and nothing more, unless the
22 judge found facts allowing a sentence of the lowest or highest term in
23 years. Factfinding to elevate a sentence from the lowest to the highest
24 term in years, the Cunningham Court's decisions make plain and simple,
25 falls within the province of the jury employing a beyond-a-reasonable-
26 doubt standard, not a bailiwick of the judge determining the preponderance
27 of evidence lies.

28 ///

PETITIONERS PRAYER FOR RELIEF

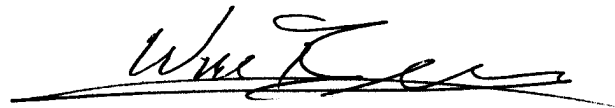
Petitioner is without remedy saved by Writ of Habeas Corpus.

WHEREFORE, petitioner prays the Court:

- a). issue writ of habeas corpus;
- b) declare right of petitioner;
- c) resentence petitioner accordingly;
- d) appoint counsel and award attorney fee's; and
- e) grant any other further relief the Court deems necessary and appropriate.

DATED: *23 Jan 2008*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Will Brown", is written over a horizontal line.

William O. Brown II

1 WILLIAM ODESSA BROWN II, K-93463
2 CTF/HWY 101, P.O. BOX 705
3 Soledad, CA 93960-0705

4 Plaintiff, In Pro Se

5 IN THE SUPERIOR COURT OF CALIFORNIA

6 IN AND FOR THE COUNTY OF SANTA CRUZ

7 WILLIAM ODESSA BROWN II,

Case No. S7-09413

8 Plaintiff,

9 vs.

PETITION FOR REDUCTION OF
RESTITUTION FINE/AMENDMENT
OF ABSTRACT OF JUDGEMENT

10 PEOPLE OF CALIFORNIA,

11 Defendants.
12

13 TO THE HONORABLE SUPERIOR COURT JUDGE:

14 PLEASE TAKE NOTICE that the Plaintiff, William O. Brown now comes
15 before the court, to petition this court as authorized under the California
16 Rules of the Court, § 104, § 105(C), § 132(B)(C), to redress the above
17 entitled matter for which this court has jurisdiction to amend judgement
18 set forth in the above matter.

19 Petitioner was convicted of Voluntary Manslaughter on 14 April
20 1998, and was sentenced on the 20th of April 1998 to a term of 13 years.

21 Mr. Brown, was further ordered to pay a restitution fine in the
22 amount of Two Thousand Six Hundred Dollars, (\$2,600.00) at the time he
23 was sentenced. However; this issue was not realised upon appeal based on
24 the fact that the Plaintiff's counsel failed to petition the court
25 concerning the "ability to pay" such a fine imposed by this court.

26 ///

27 ///

28 ///

Petitioner's counsel furthermore failed to motion the court for an "Ability To Pay" hearing for which the records will clearly establish the fact that Mr. Brown did not have the "ability to pay" such a fine placed upon him that has been imposed by this court.

Petitioner shall at this time, bring points and authorities to establish legal grounds for which entitle the Plaintiff for relief.

POINTS AND AUTHORITY IN

SUPPORT OF THIS PETITION

As of the effective date of 14 September 1992; Government Code §13967(A) was amended to read;

"If the person is convicted of one or more felony offenses, the court shall impose a separate/additional restitutional fine of not less than (\$200), subject to defendants ability to pay, and not more than (\$1,000.00)" emphasis added.

The California Court of Appeals, Fifth District, In; People v. Saelee, (1995), 40 Cal.Rptr. 2d 790; 35 Cal.App. 4th 27. Found the Following:

1). Where the fine exceeds the statutory minimum, Gov. Sec. § 13967(A), as amended, requires a finding that the defendant has the "ability to pay" the fine before it can be imposed.

2). If there is no evidence or information before the court supporting a finding of "Ability to Pay", the court has exceeded it's statutory power in posing a the fine.

3) In so far as the record shows, saelee had no exisiting assests from which he could satisfy any porion of the fine. Nor does it appear reasonably probrobale saelee will be able to pay the fine of that amount in the future. In light of low prison wages rates (See Cal. Code Regulations Title 15, 3040(A); Dept of Corr., Operations Manual, 51120-2.1, pp.51120-2) it is appearent that the possibility the pettioner be able to pay the court imposed fine will not be possible.

The fact court Saelee, after reviewing the records established the fact that there was no "ablity"to pay" hearing, the records in fact showed just the opposite. The probation report shows there was no assests at the time of sentencing nor the likily hood of obtaing assests in the future. Therefore; the court ordered the following findings:

The judgement is modified to reduce the amount of restitution fine (Gov. Code 1396(A) from (10,000.00) to (200.00) dollars and the trial court is directed to prepare an admended Abstract of Judgement reflecting this modification and forward a copy to the appropities. (At pp.793)

SUMMARY AND CONCLUSION

Petitioner, as in Saelee, was not given an "Ability To Pay" Hearing, and such he should have been protected from the incrise in the minimum as was the decision of the court of appeals, Fifth District In; PEOPLE v SAELEE, (Supra), Based upon the records will clearly show that the petitioner was entilted to the benifit of the "ability to pay" clause. For wich the record does not support an "Ability To Pay" such a fine.

Therefore; it is belived that this court, as cited in; SAELEE, SUPRA, "Exceeded it's statuttory power" in imposing a restitution fine above (\$ 200.00) dollars.

PRAYER FOR RELIEF

Petitioner is without remedy saved by Writ of Habeas Corpus.

WHEREFORE, petitioner prays that the Court:

- 1) issue a Writ of Habeas Corpus;
- 2) reduce the restitution fine to \$ 200.00
- 3) Amend the Abstract of Judgement to reflect the reduction;
- 4) forward a copy of the amended Abstract of Judgement to the Department of Corrections and Rehabilitations
- 5) grant any other relief the court deems necessary and appropriate.

DATED: 16 April 2007

23 Jan 07

Respectfully submitted,


William Brown II

Exhibit A

"Abstract of Judgment"

Cal. Fomia Superior Court

Santa Cruz

"Denial"

Exhibit B

FILED

JUN 20 2007

ALEX CARVO, CLERK
BY *[Signature]*
DEPUTY, SANTA CRUZ COUNTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

In re the Matter of:

NO. S7-09413

WILLIAM ODESSA BROWN II,

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner,

For Writ of Habeas Corpus.

A petition for writ of *habeas corpus* was filed April 20, 2007. The petition requests relief pursuant to *Cunningham v. California* (2007) ____ U.S. ____, 127 S.Ct. 856. Petitioner was sentenced in 1998.

Cunningham has its roots in two prior Supreme Court cases, *Apprendi v. New Jersey* (2000) 530 U.S. 296 and *Blakely v. Washington* (2004) 542 U.S. 296. Both federal and California courts have ruled that the holdings of those cases do not have retroactive application. There is nothing in the holding or reasoning of the *Cunningham* case which

///

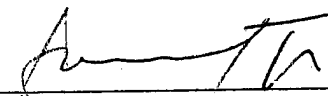
///

///

1 causes this court to anticipate any different result. Accordingly, the *Cunningham* case does
2 not have application to a sentencing which occurred in 1998.

3 The petition is denied.

4
5
6 DATED: June 19, 2007


7 SAMUEL S. STEVENS
8 Judge of the Superior Court
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED

JUN 21 2007

ALEX GALVO, CLERK
BY *[Signature]*
DEPUTY, SANTA CRUZ COUNTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CRUZ

In re the Matter of:

NO. S7-09413

THE PEOPLE OF THE STATE OF
CALIFORNIA,

ORDER DENYING PETITION FOR
REDUCTION OF RESTITUTION FINE

Plaintiff,

vs.

WILLIAM ODESSA BROWN II

Defendant.

A petition for reduction of restitution fine was filed on April 20, 2007. The petition complains that a \$2,600 fine was imposed at the time of sentencing without consideration of petitioner's ability to pay.

Penal Code §§ 1202.4(b)(1) and 1202.4(c) specifically approve of the imposition of the fine assessed in a case such as this where the fine was calculated at \$200 for each year imposed without consideration of ability to pay.

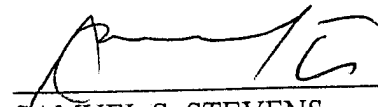
///

///

1 The petition is denied.

2
3 DATED:

June 21, 2007



SAMUEL S. STEVENS
Judge of the Superior Court

Name William O. Brown IIAddress HWY 101, P.O. BOX 705Soledad, CA 93960-0705Correctional Training FacilityCDC or ID Number K-93463

MC-275

FILED
SUPERIOR COURT
OF CALIFORNIA
COUNTY OF SANTA CRUZ
2007 APR 20 PM 12:04
LISA MEYLING

IN THE SUPERIOR COURT OF CALIFORNIAIN AND FOR THE COUNTY OF SANTA CRUZ

(Court)

PETITION FOR WRIT OF HABEAS CORPUS

WILLIAM ODESSA BROWN II

Petitioner

vs.

THE STATE OF CALIFORNIA

Respondent

No.

57-09413

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☒ A conviction
 ☐ Parole
☒ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline
☐ Other (specify): _____

1. Your name: WILLIAM ODESSA BROWN II
 2. Where are you incarcerated? CORRECTIONAL TRAINING FACILITY
 3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

192 (a) Voluntary Manslaughter and 245(a)(1) assault with force

- b. Penal or other code sections: 192(a)&245(a)(1)

- c. Name and location of sentencing or committing court: Santa Cruz, CA, Superior Court

- d. Case number: S7-09413

- e. Date convicted or committed: ~~4-20-98~~ 8-6-97

- f. Date sentenced: 4-20-98

- g. Length of sentence: 13 years

- h. When do you expect to be released? 2009

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Don Kelly, Public Defender's Office

4. What was the LAST plea you entered? (check one)

☐ Not guilty
 ☐ Guilty ☒ Nolo Contendere
 ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have? n/a

☐ Jury
 ☐ Judge without a jury
 ☐ Submitted on transcript
 ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

see attached

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

see attached

In Teague, the Court held that "new rules of criminal procedure will not be applicable to those cases which have become final before new rules are announced," *id.* at 310, 109 S. Ct., 1075 unless the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making to proscribe,' "*id.*, at 311, 109 S. Ct., at 1075. In short, the Judge cannot give a sentence more than what the DSL proscribes or mandates. In that case, according to the DSL that range can only be the statutory maximum and that statutory maximum is six (6) years for a charge of Voluntary Manslaughter, (PC 192 a).

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Cunningham v. California, Apprendi v. New Jeersey, Blakely v. Washington.

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes. ☐ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

Sixth Appellate, San Jose

b. Result Denied

c. Date of decision: _____

d. Case number or citation of opinion, if known: _____

e. Issues raised: (1) _____

(2) _____

(3) _____

f. Were you represented by counsel on appeal? ☒ Yes. ☐ No. If yes, state the attorney's name and address, if known:

Anthony Bole, Santa Cruz

9. Did you seek review in the California Supreme Court? ☐ Yes ☒ No. If yes, give the following information:

a. Result _____

b. Date of decision: _____

c. Case number or citation of opinion, if known: _____

d. Issues raised: (1) _____

(2) _____

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

there were no appellable issues, stated by atty.

Furthermore, Cunningham decision had not been decided.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.
 Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes. If yes, continue with number 13. ☒ No. If no, skip to number 15.

13. a. (1) Name of court: _____
 (2) Nature of proceeding (for example, "habeas corpus petition"): _____
 (3) Issues raised: (a) _____
 (b) _____
 (4) Result (Attach order or explain why unavailable): _____
 (5) Date of decision: _____
- b. (1) Name of court: _____
 (2) Nature of proceeding: _____
 (3) Issues raised: (a) _____
 (b) _____
 (4) Result (Attach order or explain why unavailable): _____
 (5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Cunningham case was not decided until 1/22/07.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. , ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

N/A

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

16 April 07

[Signature]
 (SIGNATURE OF PETITIONER)

1 William O. Brown II, K-93463
CTF-N/Hwy 101, P.O. BOX 705
2 Soledad, CA 93960-0705

3 Petitioner, In Pro Per
4
5
6
7

8 IN THE SUPERIOR COURT OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SANTA CRUZ

10 In re:

Case No. S7-09413

11 WILLIAM ODESSA BROWN II,

12 Plaintiff,

PETITION FOR WRIT OF HABEAS
CORPUS.

13 ON HABEAS CORPUS.
14 _____/

15
16 INTRODUCTION

17 Petitioner was sentenced to multiple terms under the DSL. Court
18 Rules adopted to implement the DSL define circumstances in aggravation
19 as facts that justify the upper term. Based on the sentencing judges
20 findings petitioner was sentenced to an aggravated term, which is the
21 upper term according to the scope of the DSL sentencing guidelines.

22 The DSL, by placing sentence-elevating factfinding within the judge's
23 province, violates a defendant's right to trial by jury safeguarded by
24 the Sixth and Fourteenth Amendments.

25 ///

26 ///

27 ///

28 ///

STATEMENT OF FACTS

Petitioner was sentence to (13) thirteen years in state prison for the following offenses; PC § 192(a) Voluntary Manslaughter, PC § 245(a)(1) Assault With Force; and PC § 667.5(1) Prison Prior Enhancement. (Ex. A) Petitioner was sentenced to a total term of thirteen years for the listed offenses.

CONTENTIONS

I.

Petitioner was denied his due process rights under Cunningham v. California (2007). Petitioner has been exposed to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by preponderance of evidence. See 530 U.S. 446, 490. Apprendi v. New Jersey.

II.

There were no facts presented found by the judge, therefore petitioner could not receive a sentence above the standard range, which would be the mid-term according to the DSL, and not the upper term. By applying Apprendi, the court held that this type of application to be unconstitutional.

III.

Petitioner could not have been sentenced above the standard range absent an additional fact. Consequently, that fact is subject to the Sixth Amendment jury trial guarantee. It does not matter that the petitioner's sentence, through outside the standard, was within the maximum.

///

///

1 The judge could not have imposed a sentence outside the standard range
2 without finding an additional fact, the mid-term should have been the
3 relevant statutory maximum.

4 IV.

5 In all material respects, California's DSL resembles the sentencing
6 systems invalidated in Blakely and Booker. Following the reasoning in
7 those cases, the middle term prescribed under California law, not the
8 upper term, is the relevant statutory maximum. Because aggravating facts
9 that authorize the upper term are found by the judge, and need only be
10 established by preponderance of evidence, the DSL violates the rule of
11 Apprendi. The DSL requires statutory sentence enhancements (as distinguished
12 from aggravators) to be charged in the indictment and proved to a jury
13 beyond a reasonable doubt.

14 V.

15 The DSL, however, does not resemble the advisory system the Court
16 in Booker had viewed. Under California's system, judges are not free to
17 exercise their discretion to select a specific sentence within a defined
18 range. Ibid. California's Legislature has adopted sentencing triads, three
19 fixed sentences with no range between them. Petitioner's sentencing judge
20 had no discretion to select a sentence within the lower or upper terms,
21 but had to impose the mid-term, nothing less and nothing more, unless the
22 judge found facts allowing a sentence of the lowest or highest term in
23 years. Factfinding to elevate a sentence from the lowest to the highest
24 term in years, the Cunningham Court's decisions make plain and simple,
25 falls within the province of the jury employing a beyond-a-reasonable-
26 doubt standard, not a bailiwick of the judge determining the preponderance
27 of evidence lies.

28 ///

PETITIONERS PRAYER FOR RELIEF

Petitioner is without remedy saved by Writ of Habeas Corpus.

WHEREFORE, petitioner prays the Court:

- a). issue writ of habeas corpus;
- b) declare right of petitioner;
- c) resentence petitioner accordingly;
- d) appoint counsel and award attorney fee's; and
- e) grant any other further relief the Court deems necessary and appropriate.

DATED: 16 April 2007

Respectfully submitted,


William O. Brown II

1 WILLIAM ODESSA BROWN II, K-93463
2 CTF/HWY 101, P.O. BOX 705
3 Soledad, CA 93960-0705

4 Plaintiff, In Pro Se

5 IN THE SUPERIOR COURT OF CALIFORNIA

6 IN AND FOR THE COUNTY OF SANTA CRUZ

7 WILLIAM ODESSA BROWN II,

Case No. S7-09413

8 Plaintiff,

9 vs.

PETITION FOR REDUCTION OF
RESTITUTION FINE/AMENDMENT
OF ABSTRACT OF JUDGEMENT

10 PEOPLE OF CALIFORNIA,

11 Defendants.
12 _____/

13 TO THE HONORABLE SUPERIOR COURT JUDGE:

14 PLEASE TAKE NOTICE that the Plaintiff, William O. Brown now comes
15 before the court, to petition this court as authorized under the California
16 Rules of the Court, § 104, § 105(C), § 132(B)(C), to redress the above
17 entitled matter for which this court has jurisdiction to amend judgement
18 set forth in the above matter.

19 Petitioner was convicted of Voluntary Manslaughter on 14 April
20 1998, and was sentenced on the 20th of April 1998 to a term of 13 years.

21 Mr. Brown, was further ordered to pay a restitution fine in the
22 amount of Two Thousand Six Hundred Dollars, (\$2,600.00) at the time he
23 was sentenced. However; this issue was not raised upon appeal based on
24 the fact that the Plaintiff's counsel failed to petition the court
25 concerning the "ability to pay" such a fine imposed by this court.

26 ///

27 ///

28 ///

Petitioner's counsel furthermore failed to motion the court for an "Ability To Pay" hearing for which the records will clearly establish the fact that Mr. Brown did not have the "ability to pay" such a fine placed upon him that has been imposed by this court.

Petitioner shall at this time, bring points and authorities to establish legal grounds for which entitle the Plaintiff for relief.

POINTS AND AUTHORITY IN

SUPPORT OF THIS PETITION

As of the effective date of 14 September 1992; Government Code §13967(A) was amended to read;

"If the person is convicted of one or more felony offenses, the court shall impose a seperate/additional restitutional fine of not less than (\$200), subject to defendants ability to pay, and not more than (\$1,000.00)" emphasis added.

The California Court of Appeals, Fifth District, In; People v. Saelee, (1995), 40 Cal.Rptr. 2d 790; 35 Cal.App. 4th 27. Found the Following:

1). Where the fine exceeds the statutory minimum, Gov. Sec. § 13967(A), as amended, requires a finding that that the defendant has the "ability to pay" the fine before it can be imposed.

2). If there is no evidence or information before the court supporting a finding of "Ability to Pay", the court has exceeded it's statutory power in posing a the fine.

3) In so far as the record shows, saelee had no exisiting assests from which he could satisfy any porion of the fine. Nor does it appear reasonably probrobale saelee will be able to pay the fine of that amount in the future. In light of low prison wages rates (See Cal. Code Regulations Title 15, 3040(A); Dept of Corr., Operations Manual, 51120-2.1, pp.51120-2) it is appearent that the possibility the pettioner be able to pay the court imposed fine will not be possible.

The fact court Saelee, after reviewing the records established the fact that there was no "ablity"to pay" hearing, the records in fact showed just the opposite. The probation report shows there was no assests at the time of sentencing nor the likily hood of obtaing assests in the future. Therefore; the court ordered the following findings:

The judgement is modified to reduce the amount of restitution fine (Gov. Code 1396(A) from (10,000.00) to (200.00) dollars and the trial court is directed to prepare an admended Abstract of Judgement reflecting this modification and forward a copy to the appropities. (At pp.793)

SUMMARY AND CONCLUSION

Petitioner, as in Saelee, was not given an "Ability To Pay" Hearing, and such he should have been protected from the increse in the minimum as was the decision of the court of appeals, Fifth District In; PEOPLE v SAELEE, (Supra), Based upon the records will clearly show that the petitioner was entilted to the benifit of the "ability to pay" clause. For wich the record does not support an "Ability To Pay" such a fine.

Therefore; it is belived that this court, as cited in; SAELEE, SUPRA, "Exceedded it's statuttory power" in imposing a restitution fine above (\$ 200.00) dollars.

PRAYER FOR RELIEF

Petitioner is without remedy saved by Writ of Habeas Corpus.

WHEREFORE, petitioner prays that the Court:

- 1) issue a Writ of Habeas Corpus;
- 2) reduce the restitution fine to \$ 200.00
- 3) Amend the Abstract of Judgement to reflect the reduction;
- 4) forward a copy of the amended Abstract of Judgement to the Department of Corrections and Rehabilitations
- 5) grant any other relief the court deems necessary and appropriate.

DATED: 16 April 2007

Respectfully submitted,


William Brown II

California Court of Appeal

Sixth Appellate District

"Denial"

Exhibit C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COPY
Court of Appeal - Sixth App. Dist.
FILED

JUL 9 - 2007

MICHAEL J. YERLY, Clerk

By _____ DEPUTY

In re WILLIAM ODESSA BROWN II,
on Habeas Corpus.

H031715
(Santa Cruz County
Super. Ct. No. S709413)

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Mihara, Acting P.J., and McAdams, J., participated in this decision.)

Dated JUL 9 - 2007 MIHARA, J. Acting P.J.

Petitioner. Copy

MC-275

Name William Brown
 Address CTF Hwy 101 P.O. Box 705
Soledad CA 93960-0705
Correctional Training Facility
 CDC or ID Number K93463

In The Court of Appeal
For The Sixth Appellate
 (Court)

COPY
FILED

JUN 15 2007

By MICHAEL J. FERRELL, Clerk

PETITION FOR WRIT OF HABEAS CORPUS

H031715

No.

(To be supplied by the Clerk of the Court)

H031715

<u>William Brown</u> Petitioner	vs.	<u>The State of California</u> Respondent <u>Warden Ben Curry</u>
------------------------------------	-----	---

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

122

California Supreme

Court Denial

Exhibit D

Name William O. Brown IIAddress Hwy 101 P.O. Box 705Scheda CA 93960-0705Correctional Training FacilityCDC or ID Number K93463SUPREME COURT
FILED

MC-275

JUL 16 2007

Frederick K. Ohlrich Clerk

RECEIVED

JUL 16 2007

CLERK SUPREME COURT

IN THE California Supreme Court

(Court)

PETITION FOR WRIT OF HABEAS CORPUS

No.

S154458

(To be supplied by the Clerk of the Court)

<u>William Brown</u>
Petitioner
vs.
<u>State of California</u>
Respondent
<u>Warden Ben Curry</u>

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

124

S154458

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re WILLIAM ODESSA BROWN on Habeas Corpus

The petition for writ of habeas corpus is denied.

Werdegarr, J., was absent and did not participate.

SUPREME COURT
FILED

JAN - 3 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

125

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF IMPERIAL

(C.C.P. SEC. 446 & 2015.5; 28 U.S.C. SEC. 1746)

I, Wm Brown DECLARE UNDER THE PENALTY OF PERJURY THAT: I AM THE Plaintiff IN THE ABOVE ENTITLED ACTION; I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 23 Jan DAY OF 2008 AT CALIPATRIA
STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002

(SIGNATURE)

Wm Brown
(DECLARANT/PRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC. 1013 (a) & 2015.5; 28 U.S.C. SEC. 1746)

I, Wm Brown, AM A RESIDENT OF CALIPATRIA STATE PRISON, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA; I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM NOT A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 5002, CALIPATRIA, CALIFORNIA 92233-5002

ON 23 Jan, 2008 I SERVED THE FOREGOING:

Writ of Habeas Corpus

(SET FORTH EXACT TITLE OF DOCUMENT(S) SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY(S) THEREOF, ENCLOSED IN A SEALED ENVELOPE(S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CALIPATRIA STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002

USDC, N. Dist. CA
450 Golden Gate Ave
San Fran CA 94102

Dist Atty off
701 Ocean St
Santa Cruz CA 95060

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 23 Jan 2008

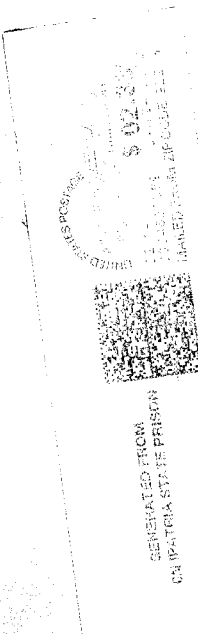
William Brown
(DECLARANT/PRISONER)

178

ONLY

Wm Brown K. 9346335242

PO BOX 5004
Colipatria CA 92233



USDC. N. Dist CA
450 Golden Gate Ave
S.F. CA 94102

RECEIVED

JAN 29 2008

RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Signature]

LEGAL MAIL ONLY

